Supreme Court, U.S.
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No. 96-1936
In the Supreme Court of the United States
October Term, 1996

FAIRPORT INTERNATIONAL EXPLORATION, INC.,

Petitioner,

v.

STATE OF MICHIGAN,

and

Respondent,

THE SHIPWRECKED VESSEL KNOWN AS THE CAPTAIN LAWRENCE, *in rem*,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT STATE OF MICHIGAN IN OPPOSITION TO PETITION

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QUESTION PRESENTED

Whether Congress intended to require proof of express, affirmative abandonment to establish state ownership of shipwrecks under the Abandoned Shipwrecks Act ("ASA"), 43 U.S.C. §§ 2101-2106.

PARTIES TO THE PROCEEDINGS

The caption of the case in this Court contains the names of all the parties to the proceedings in the Court of Appeals for the Sixth Circuit. The Shipwrecked Vessel Known As The Captain Lawrence, although nominally a party in this *in rem* admiralty action, has never been separately represented and has not participated in any proceedings below.

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OPINIONS BELOW

The Opinions below are set forth in *Fairport Int'l Exploration, Inc., v. The Captain Lawrence*, 913 F. Supp. 552 (W.D. Mich. N.D. 1995), *aff'd.* 105 F.3d 1078 (6th Cir. 1997).

BASIS OF JURISDICTION

28 U.S.C. § 1254(1) provides that this Court may issue a writ of certiorari to the court of appeals upon the petition of any party in a civil case.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. amend. XI and the Abandoned Shipwrecks Act ("ASA"), 43 U.S.C. §§ 2101-2106 have been set forth in pertinent part in the petition at pages 2-4.

COUNTER-STATEMENT OF THE CASE

This action began with Petitioner's complaint which claimed that the district court had jurisdiction *in rem* over the alleged shipwreck of the Captain Lawrence and *in personam* over any competing claimant or salvor. Complaint, ¶ 9. Petitioner requested title to the vessel or a liberal salvage award *in specie*, and a permanent injunction preventing any third party from interfering with its exclusive right to salvage property within an area larger than 12.6 square nautical miles.

Respondent State of Michigan ("Michigan") filed its motion to intervene and its motion to dismiss the complaint for lack of jurisdiction under U.S. Const. amend. XI. The district court granted the motion to intervene and ordered an evidentiary hearing on the motion to dismiss. At the hearing, Michigan was required over its objection to prove by a preponderance of the evidence that the alleged vessel was abandoned and embedded in Lake Michigan bottomlands. Based on the evidence presented, the district court found that Michigan had proved by a preponderance of the evidence that the alleged vessel was abandoned and embedded in state-owned bottomlands. Having thus proved "a colorable claim" to the alleged vessel, Michigan's motion to dismiss under U.S. Const. amend. XI was granted. *Fairport Int'l Exploration, Inc. v. The Captain Lawrence*, 913 F. Supp. 552 (W.D. Mich. N.D. 1995).

The Court of Appeals for the Sixth Circuit affirmed the district court in all respects, including the requirement that Michigan prove by a preponderance of the evidence that the alleged vessel was both abandoned and embedded in state bottomlands. *Fairport Int'l Exploration, Inc. v. The Captain Lawrence*, 105 F.3d 1078 (6th Cir. 1997).

Petitioner's "Statement of the Case" contains some misstatements. The record indicates that Wilfred Behrens' destination in August, 1933 was Summer Island, not Poverty Island. More importantly, the record does not support the assertion that Behrens returned to Poverty Island to salvage his vessel. The district judge noted in his opinion that there was no evidence that Behrens attempted to salvage the vessel in the years after the wreck. Likewise, the court of appeals

found nothing "in [its] independent consideration of the record that could support Fairport's claim that Behrens evidenced the desire and intention to salvage the vessel." 105 F.3rd at 1080.

Petitioner further states that Steven Libert identified a propeller shaft as being from the Captain Lawrence. There is no evidence that a propeller shaft was ever recovered. Furthermore, while Libert did recover a propeller blade and an anchor which in his opinion were from the Captain Lawrence, he had no qualifications to make the identification. The district court found as follows:

> The anchor removed from the area by Libert in 1985 is consistent with what might have been used on the Captain Lawrence, but it is not distinctive. Similar anchors were in common usage for 100 years, and it is not unusual to find an anchor even where there has been no shipwreck.
>
> The propeller blade is consistent with a ship from the 1930's, but it cannot be identified as belonging to the Captain Lawrence. Moreover, the Record of Casualties reports a broken propeller shaft rather than a broken propeller blade.

913 F. Supp. at 556.

The district court relied on the following evidence in making its determinations with respect to the anchor and propeller blade: Kenneth R. Potts, Director of the Michigan Maritime Museum in Grand Haven, Michigan, testified that the anchor was not unusual and was of the "folding stock" variety, sometimes referred to as a "kedge" anchor. Potts also testified that lost anchors are often unassociated with any shipwreck. As for the propeller blade, John Althouse, a naval architect and project engineer for the Michigan Wheel Corporation, testified that the blade could not be linked to any vessel. This evidence was presented by Michigan to meet the burden of proof imposed by the district court.

SUMMARY OF ARGUMENT

This Court should not grant certiorari on an issue which was not properly before the federal court. The issue of proofs necessary to establish abandonment of artifacts from any shipwreck in Michigan's bottomlands should have been litigated in state court. There can be no doubt that Michigan asserted a "colorable claim" to any such artifacts. That should have ended the district court's inquiry.

Rather than grant certiorari, the Court would be better advised to hold the case in abeyance until *California v. Deep Sea Research*, No. 96-1400, is decided. That case squarely presents the only constitutional issue involved in this case, *i.e.* whether Eleventh Amendment immunity is contingent upon a state proving its ownership by a preponderance of the evidence.

Requiring Michigan to prove abandonment and embeddedness by a preponderance of the evidence essentially required the proof necessary for a judgment in Michigan's favor on the merits. This was both contrary to the Amendment and a waste of judicial and litigant resources. Furthermore, the burden imposed by the courts below will in future cases inevitably frustrate the intent of Congress as expressed in the ASA. The demise of the Captain Lawrence occurred only 64 years ago. Although difficult to locate, documents pertaining to the vessel still existed. This will not be the case with shipwrecks of more remote vintage.

ARGUMENT

I.

CERTIORARI SHOULD NOT BE GRANTED ON THE QUESTION PRESENTED.

This Court's *Rule 10* provides that certiorari will be granted only for "compelling reasons." In the case of conflict among the circuits, the difference must relate to an "important matter." *Rule 10(a)*. Michigan submits that the standard of proof of abandonment is not such a compelling or important matter which would warrant granting the writ in this case. The lower court's decision that Congress did not intend a test of express abandonment in the Abandoned Shipwrecks Act ("ASA"), 43 U.S.C. §§ 2101-2106, is correct as a matter of common sense, legislative history, and maritime law.

As a matter of common sense, the district court was correct in its observation that abandonment must often be determined on the basis of circumstantial evidence. As the State's administrator of regulatory programs relating to its bottomlands testified below, it is unusual for an owner of a shipwreck to actively disclaim ownership. The only motivation for an owner to proclaim abandonment is to avoid liability where the wreck presents a hazard to navigation. Historic shipwrecks do not present such a hazard.

Because abandonment is a question of fact relating to the owner's intent, it often must be established in the same manner as other factual issues involving intent in civil litigation -- by a preponderance of the evidence. Although Congress did not define the term "abandoned," the legislative history of the ASA establishes that Congress intended that the concept may be inferred from all the circumstances. In the Report of the House Committee on Interior and Insular Affairs, the Committee reported the following with respect to abandonment:

> The Committee notes that the term "abandoned" does not require the original owner to actively disclaim title or ownership. The abandonment or relinquishment of

> ownership rights may be implied or otherwise inferred, as by an owner never asserting any control over or otherwise indicating his claim of possession of the shipwreck.

H.R. Rep. No. 514, 100th Cong., 2nd Sess., pt. 1, at 2 (March 14, 1988), reprinted in 1988 U.S.C.C.A.N. 365, 366.

In the Report by the House Merchant Marine and Fisheries Committee, it is noted:

> Abandoned shipwrecks within the scope of this Act include those which have been deserted and to which the owner has relinquished all ownership rights. Except in the case of U.S. warships or other public vessels (which require an affirmative act of abandonment), the act of abandonment may be implied or inferred from the circumstances of the shipwreck as when an owner has never asserted any control over or otherwise indicated a claim of possession.

H.R. Rep. No. 514, *supra*, pt. 2, at 5 (March 28, 1988), reprinted in 1988 U.S.C.C.A.N. 370, 373-374.

Congress' understanding of the concept of abandonment is consistent with the weight of authority under general maritime and common law. Whether a sunken wreck has been abandoned is a question of fact. *Nunley v. M/V Dauntless Colocotronis*, 863 F.2d 1190, 1198, fn. 11 (5th Cir. 1989). Abandonment may be inferred from all the relevant facts and circumstances. *Wiggins v. 1100 Tons, More or Less, of Italian Marble*, 186 F. Supp. 452, 456 (E.D. Va. 1960).

No formal declaration of abandonment is necessary. Rather, abandonment may be inferred from conduct of the owner inconsistent with an intention to return to the property. Abandonment may also be inferred from the nature and situation of the property itself. *Hatteras, Inc. v. U.S.S. Hatteras*, 1984 A.M.C. 1094, fn. 5 (S.D. Tex. 1981), *aff'd. without opinion*, 698 F.2d 1215 (5th Cir. 1983). Circumstances from which abandonment may be permissibly inferred include nonuse and lapse of time coupled with the owner's failure to

act or otherwise assert any claim to the property. *Id. See also Chance v. Certain Artifacts Found & Salvaged From The Nashville*, 606 F. Supp. 801, 804 (S.D. Ga. 1984), *aff'd. without opinion*, 775 F.2d 302 (11th Cir. 1985). As stated by the district court in *Chance, supra*, "[m]odern courts, however, have rejected the salvage law theory that title to property can never be lost. They have instead applied the law of finds under the doctrine of 'animus revertendi' (the owner has no intention of returning)." 606 F. Supp. at 804. *See also, Treasure Salvors, Inc. v. Unidentified, Wrecked & Abandoned Sailing Vessel*, 569 F.2d 330, 336 (5th Cir. 1978); *Jupiter Wreck, Inc. v. Unidentified, Wrecked & Abandoned Sailing Vessel*, 691 F. Supp. 1377, 1385 (S.D. Fla. 1988); *Indian Recovery Co. v. The China*, 645 F. Supp. 141, 144 (Del. 1986); *Klein v. Unidentified, Wrecked & Abandoned Sailing Vessel*, 758 F.2d 1511, 1513 (11th Cir. 1985).

It is thus clear what Congress intended by the term "abandoned." Furthermore, whether property has been abandoned is an issue which the state courts confront on a regular basis. The only question of constitutional significance resolved by the courts below was the Eleventh Amendment issue. The same issue is pending before this Court in *California v. Deep Sea Research, Inc.*, No. 96-1400.

If the courts below had properly proceeded in view of Michigan's Eleventh Amendment claim, the question of title to the alleged shipwreck would not have been decided in federal court. The Eleventh Amendment "bars suits in admiralty against the states, even though such suits are not, strictly speaking, 'suits in law or equity.'" *Welch v. Texas Dep't of Highways & Public Transp.*, 483 U.S. 468, 472-73 (1987), citing, *inter alia, Ex parte New York, No. 2*, 256 U.S. 503; 65 L. Ed. 1063; 41 S. Ct. 592 (1921). In *Ex parte New York, No. 2*, one issue was the manner in which New York was required to establish its claim to the Queen City. This Court resolved the issue as follows:

> We deem it clear, however, that the verified suggestion presented by the Attorney General of that State, in his official capacity as representative of the State and the People thereof, amounts to an official certificate concerning a public matter presumably within

> his official knowledge, and that it ought to be accepted as sufficient evidence of the fact, at least in the absence of special challenge. . . . It would be an unwarranted aspersion upon the honor of a great State to treat facts thus solemnly certified by its chief law officer, and accepted as true when passed upon by the District Court, as now requiring verification.

256 U.S. at 509-510.

It is ironic that New York's claim of title made merely on the statement of its Attorney General was deemed sufficient to create immunity from federal court jurisdiction, while in the instant case Michigan was required to prove by a preponderance of the evidence that any remains of the Captain Lawrence were abandoned and embedded in state bottomlands. To say the least, this was a heavy burden, especially where Michigan shared the district court's "very serious reservations as to whether [Petitioner] has in fact found any evidence of the Captain Lawrence." 913 F. Supp. at 557.

The district court's definition and allocation of the burden of proof of abandonment was contrary to the Eleventh Amendment. Various courts of appeal have held that the rights of a state which asserts a claim under similar circumstances cannot be adjudicated in federal court without the consent of the state. *Maritime Underwater Surveys Inc. v. The Whidah*, 717 F.2d 6, 8 (1st Cir. 1983); *Fitzgerald v. The HMS Defiance*, 866 F.2d 16, 18-19 (1st Cir. 1989); *Sindia Expedition, Inc. v. Wrecked & Abandoned Vessel*, 895 F.2d 116, 122 (3rd Cir. 1990); *Florida v. Treasure Salvors Inc.* [after remand] 689 F.2d 1254, 1256 (5th Cir. 1982); *Zych v. The Lady Elgin*, 960 F.2d 665, 670 (7th Cir. 1992); *Marx v. Guam*, 866 F.2d 294, 299 (9th Cir. 1989).

With this Court's plurality opinion as guidance, the court of appeals in *Florida v. Treasure Salvors Inc.* [after remand] recognized that the Eleventh Amendment was a bar to adjudication of Florida's ownership interest:

> The Supreme Court made it clear that resolution of the validity of the warrant "does not require

> -- *or permit* -- a determination of the state's ownership of the artifacts." *Treasure Salvors*, 458 U.S. at 699, 102 S. Ct. at 3322, 73 L. Ed. 2d at 1078 (emphasis added). Treasure Salvors' lament that, unless this case resolves the ownership issue, the result of seven years of litigation will be inconclusive is, au fond, a complaint against the eleventh amendment; the State cannot be forced to litigate a claim to ownership of property in federal court.
>
> * * *
>
> We, therefore, AFFIRM the district court's opinion insofar as it directs transfer of the artifacts to Treasure Salvors. Unless the State elects voluntarily to appear and to litigate ownership, the court shall enter final judgment in the usual form for in rem actions, decreeing Treasure Salvors to be owner of the artifacts as against all claimants except the State of Florida, but declaring expressly: "This judgment does not determine in any way whether the State of Florida is the owner of these artifacts."

689 F.2d 1254, 1255-1256 (5th Cir. 1982) [footnote omitted].

In *Sindia Expedition*, there were several competing claimants whose rights against each other (but not as against the State of New Jersey) could be adjudicated by the district court. The court in *Sindia* observed:

> Finally, the record reveals that the rights to the Sindia are contested by other parties. Thus, the effect of the proceeding will be, if the Expedition is successful, to award it possession to the Sindia as against these parties and not against the state.

895 F.2d at 121 [footnote omitted].

> New Jersey would not be adversely affected because the district court cannot make a determination of the State's right to or interest in the property without its consent. *Treasure Salvors*, 458 U.S. at 700.

895 F.2d at 122.

> As noted, New Jersey is the only potential non-party who could assert an interest in the wreck once this litigation is concluded. . . . The victorious party may have to face the State in another forum at another time.

895 F.2d at 123 [citation omitted].

In this case, the district court held that Michigan's contention that it should not have to prove abandonment was based upon cases that involved "undisputably *abandoned* shipwrecks." 913 F. Supp. at 554 [emphasis by the district court]. This is inaccurate. In *Zych v. The Lady Elgin, supra*, the plaintiff acquired unabandoned interests in the Lady Elgin in order to defeat the State of Illinois' claim. Just as in this case, the district court invited the State of Illinois to establish its claim that the Lady Elgin was indeed abandoned, and was therefore the property of that state. Illinois refused to participate in the dispute regarding abandonment before the district court. As a result, the district court concluded that Illinois' "standoffishness" waived its right to be heard on the merits of the question of whether the Lady Elgin was indeed abandoned. The district judge entered an injunction barring all potential rivals, including Illinois, from interfering with the plaintiffs' efforts to raise artifacts from the wreck. The injunction was reversed by the Court of Appeals which held:

> The strength of the state's legal position is irrelevant; the Eleventh Amendment prevents the district judge from exercising jurisdiction.

960 F.2d at 670.

To determine whether Illinois' claim was colorable, only a cursory review of the merits was allowed. The Seventh

Circuit defined a colorable claim as merely a determination of whether a state has "some interest":

> We hold that it is the existence, and not the strength of the claim that activates the eleventh amendment. No one doubts that Illinois has a claim, which is the principal target of the district judge's injunction.

960 F.2d at 670.

In the instant case, there is no dispute that the State of Michigan owns the bottomlands where any remains of the Captain Lawrence are embedded. The injunction requested by the Petitioner would have prohibited Michigan from interfering in any way with Petitioner's activities within a 12.6 square nautical mile area. Furthermore, Michigan was the only competing claimant. The Eleventh Amendment deprived the district court of jurisdiction to determine the strength of Michigan's claim.

Other shipwreck cases which construe the meaning of "colorable claim" did involve undisputably abandoned shipwrecks. However, the concept of abandonment was not central to the holding that the district court simply did not have jurisdiction to adjudicate a state's claim to the vessel. Thus, in *Marx v. Guam, supra*, the Ninth Circuit held that a colorable claim was established by Congress' grant of title and control to the submerged lands in the Submerged Lands Act, 43 U.S.C. § 1311 *et seq.*, and to all shipwrecks embedded in those submerged lands under the ASA. 866 F.2d at 300. The mere existence of those statutes, and Guam's assertion of title to property in its territorial waters was the "colorable claim" which deprived the district court of jurisdiction.

Similarly, the First Circuit in *Maritime Underwater Surveys, supra*, stated that it had no doubt that the state's claim was "at least colorable," but did not decide the claim "because of the Eleventh Amendment's flat prohibition of suits against states regardless of their merit." 717 F.2d at 7-8. It is therefore clear that a "colorable claim" is a claim advanced by a state based on presumptively valid state and federal statutes.

The following analysis of the court in *Subaqueous Exploration v. Unidentified, Wrecked & Abandoned Vessel*, 577 F. Supp. 597, 607 (1983), should have guided the district court in the instant case:

> The Court finds that the Submerged Lands Act of 1953, 43 U.S.C. § 1301 et seq. and Md. Nat. Res. Code Ann. § 2-309, fairly and reasonably construed, fully provide a colorable basis for the State of Maryland's claim of possession of the defendant vessels and their cargo. As mentioned earlier, the Submerged Lands Act confirmed the coastal states' title to and proprietary rights in the lands beneath navigable waters within three geographical miles from the coast line, see 43 U.S.C. §§ 1312, 1311(a), with the capacity to exercise dominion and control thereover subject to Congress' reserved right to regulate commerce, navigation, national defense, and international affairs, see id. § 1314. See, e.g., United States v. California, 436 U.S. 32, 37, 56 L. Ed. 2d 94, 98 S. Ct. 1662 (1978) (Submerged Lands Act "transferred dominion" over submerged lands to state); United States v. Alaska, 422 U.S. 184, 187, 45 L. Ed. 2d 109, 95 S. Ct. 2240 (1975); United States v. Maine, 420 U.S. 515, 525, 43 L. Ed. 2d 363, 95 S. Ct. 1155 (1975) ("the Submerged Lands Act did indeed grant to the States dominion over the offshore seabed within the limits defined in the Act)." This Court has already found that the defendant vessels and their cargo are situated on submerged lands belonging to the State of Maryland. Section 2-309 of Maryland's Natural Resource Article expressly declares that items of historical or archaeological value situated on state-owned or state-controlled land are the property of the State of Maryland. Md. Nat. Res. Code Ann. § 2-309. This Court has already found that the defendants in these proceedings are items of archaeological or

> historical value within the meaning of section 2-309. Consequently, these federal and state statutes provide a colorable basis for the State of Maryland's claim of possession of the vessels and their cargo.

577 F. Supp. at 608.

While Petitioner in the instant case did not discover artifacts of archeological or historical value, the district court did not have jurisdiction over Petitioner's request to dredge state bottomlands for archeological or exploratory purposes. *Lathrop v. The Unidentified, Wrecked & Abandoned Vessel*, 817 F. Supp. 953, 961, 966 (M. D. Fla. 1993).

In these proceedings, Michigan advanced a "colorable claim" based upon the ASA; the Submerged Lands Act, *supra*; the Great Lakes Submerged Lands Act, MCL 322.701; MSA 13.700(1), by which Michigan holds title to the unpatented bottomlands of the Great Lakes within its boundaries; and the Aboriginal Records and Antiquities Act, MCL 299.51 *et seq.*; MSA 13.21 *et seq.*, in which Michigan has declared its superior title to abandoned property of historical or recreational value found on state-owned bottomlands. MCL 299.51, *supra*, has been held constitutional and not violative of federal admiralty jurisdiction. *People v. Massey*, 137 Mich. App. 480; 385 N.W.2d 615 (1984).

CONCLUSION AND RELIEF REQUESTED

The writ of certiorari should be denied on the question presented by Petitioner. Alternatively, the case should be held in abeyance until this Court decides the constitutional question in *California v. Deep Sea Research, Inc.*, No. 96-1400, *i.e.* whether, in an *in rem* admiralty suit, Eleventh Amendment immunity is contingent upon a State first proving to a district court by a preponderance of the evidence that the State owns the shipwreck.

Respectfully submitted,

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